

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be reversed and the matter remanded to the ALJ for determination of the remaining issues.

The basic facts in this matter are not in dispute. Claimant worked for respondent as a family advocate. This job required that claimant drive 750 to 1,000 miles per week. Beginning in September 2004, claimant began experiencing symptoms in her upper extremities, including pain and tingling in her hands. Claimant began to notice that driving had a worsening effect on her symptoms. She was forced to drive with one hand and had to dangle the other hand in order to alleviate the symptoms. As claimant continued to drive over the period from September of 2004 through the summer of 2005, her symptoms worsened.¹

In late July 2005, a dispute arose between claimant and her supervisor regarding the contacts claimant was having with her supervised families. As the result of this dispute, claimant terminated her employment with respondent, with her last day at work being July 28, 2005. The parties have stipulated in their briefs to the Board that the first notice claimant provided to respondent, regarding claimant's alleged injuries, occurred on December 15, 2005.

Claimant first sought medical treatment on October 13, 2005, with David J. Fitzgerald, D.O., of Liberal, Kansas. Claimant was then referred to orthopedic surgeon Suhail Ansari, M.D., for an evaluation on October 20, 2005. Dr. Ansari diagnosed claimant with bilateral carpal tunnel syndrome. Claimant advised Dr. Ansari that she believed her problems were related to her driving. She told him she had to drive with one hand while she would have to hang the other hand down, and would then alternate. There is no indication in this record whether Dr. Ansari determined that claimant's problems stemmed from her work with respondent or if this is simply claimant's opinion expressed to the doctor. Claimant testified the first time she was advised that her problems were work related was either when she saw Dr. Fitzgerald on October 13, 2005,² or when she saw Dr. Fitzgerald on December 5, 2005.³ Claimant testified that she then notified respondent of her work-related injuries.

The Board will first address respondent's dispute regarding venue. K.S.A. 44-534a(a)(2) states that a preliminary hearing shall be summary in nature "and shall be held by an administrative law judge in any county designated by the administrative law judge." For preliminary hearing purposes, the respondent's objection to venue is dismissed.

¹ P.H. Trans. at 11.

² *Id.* at 14.

³ *Id.* at 15.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident

It is clear from this record that claimant's last day of work was July 28, 2005, and notice was not provided to respondent until December 15, 2005. This time span exceeds both the 10-day and 75-day time limits contained in K.S.A. 44-520. However, claimant argues that the date of accident in this case is not the last day worked as has, up to this point, been determined by a long line of cases.⁴

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

(d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then**

⁴ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); and *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003)

the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.⁵ (Emphasis added.)

In this case, claimant was neither taken off work nor restricted from performing the work which caused her condition until after her termination of employment. Instead, claimant quit work as a result of a dispute with her supervisor. From this record, it does not appear that claimant's decision to leave her employment was, in any way, related to her upper extremity injuries.

There is both testimony from claimant and medical evidence in the record indicating that claimant was aware her condition was being aggravated by her driving duties. However, K.S.A. 2005 Supp. 44-508(d) makes no mention of the date of accident being tied to a claimant's realization as to the cause of his or her problems.

A possible date of accident could be when a claimant is diagnosed with a work-related condition, as noted in K.S.A. 2005 Supp. 44-508(d)(2). But that fact must be communicated to the claimant "in writing". There is no indication that claimant was notified of the work-related nature of her condition "in writing". There is medical evidence in the record from the office of Dr. Ansari displaying claimant's belief that her condition was being aggravated by her driving duties. But neither that October 20, 2005 report from Dr. Ansari nor this record contains any indication that a copy of that report was given to claimant. Therefore, that date of accident standard has not been satisfied.

The last "date of accident" possibility contained in the statute is dependent upon a claimant giving written notice to the employer of the accident. Here, on December 15, 2005, claimant gave written notice of a series of accidents. This date of accident would make claimant's notice timely. It would also create the result of having a date of accident almost 5 months after a claimant's employment was terminated.

In *Boucher*,⁶ the Court of Appeals stated:

"[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction."

⁵ K.S.A. 2005 Supp. 44-508(d).

⁶ *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, rev. denied 260 Kan. 991 (1996).

State v. Schlein, 253 Kan. 205, 219, 854 P.2d 296 (1993). “When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning.* *Boatright v. Kansas Racing Comm’n*, 251 Kan. 240, Syl. ¶ 7, 834 P.2d 368 (1992).” (Emphasis added.) *State ex rel. Stephan v. Board of Seward County Comm’rs*, 254 Kan. 446, 866 P.2d 1024 (1994).

...

Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. *Chavez v. Markham*, 256 Kan. 859, 865, 889 P.2d 122 (1995); *Underwood v. Allmon*, 215 Kan. 201, 204, 523 P.2d 384 (1974). The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature. *In re Marriage of Welliver*, 254 Kan. 801, 809, 869 P.2d 653 (1994).⁷

In *Soupene*,⁸ the Supreme Court stated:

“Ordinarily, there is a presumption that a change in the language of a statute results from the legislative purpose to change its effect, but this presumption may be strong or weak according to the circumstances, and may be wanting altogether in a particular case.” *Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc.*, 231 Kan. 731, 736, 648 P.2d 1143 (1982). However, we have also stated: “Ordinarily, courts presume that, by changing the language of a statute, the legislature intends *either to clarify its meaning* or to change its effect.” (Emphasis added.) *Watkins v. Hartsock*, 245 Kan. 756, 759, 783 P.2d 1293 (1989) (citing U.S.D. 512, 231 Kan. at 731). The authors of 82 C.J.S., Statutes § 384(a), p. 897 noted: “It is presumed that an amendment is made to effect some purpose, which may be either to alter the operation and effect of earlier provisions or to clarify the meaning thereof.”⁹

When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury’s date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months,

⁷ *Id.* at 980-981.

⁸ *Estate of Soupene v. Lignitz*, 265 Kan. 217, 960 P.2d 205 (1998).

⁹ *Id.* at 220.

with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Consequently, the determination of a date of accident for repetitive trauma accidents established by case law led to situations where medical treatment was needed and provided before the “date of accident.”

The dissenting Board Member finds it unreasonable to determine a date of accident after employment has ceased. This ignores the fact that determination of a single date of accident for repetitive trauma injuries is necessarily a legal fiction. And determination of a date of accident after the employment relationship ceased is no more absurd than a determination that medical treatment was necessary before the date of accident. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is “diagnosed as work related.” Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the employment relationship terminated is not prohibited by the statute. To the contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In any event, the claimant must still meet the burden of proof that the injury arose out of and in the course of employment. That fact alone should allay any concerns that the determination of an accident date at a time when the injured worker was no longer employed leads to an unreasonable result.

K.S.A. 2005 Supp. 44-508(d) does not contain a requirement that the date of accident for a repetitive trauma injury must be limited to a date while the claimant was still employed by the respondent. Instead, it offers a series of possible “accident dates” dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In the instant case, claimant was never restricted nor taken off work by an authorized physician. Absent those facts, the next possible accident date is the earliest of either the date of claimant’s receipt in writing of notification that her condition was diagnosed as work related or the date she gave written notice to the employer of the injury. There was no evidence claimant received written notification that her condition was diagnosed as work related. But claimant did provide written notice of her injury to respondent on December 15, 2005. Consequently, under the plain language of the statute,

her date of accident is December 15, 2005, and her notice was timely for the series of microtraumas occurring through her last day worked.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated July 18, 2006, should be, and is hereby, reversed and this matter remanded to the Administrative Law Judge for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

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DISSENT

The undersigned Board Member dissents from the Order of the majority. In *Foulk*,¹⁰ the Court of Appeals held that the Workers Compensation Act should be interpreted to avoid unreasonable or absurd results. In that case, the court said:

Legislative intent should be determined from a general consideration of the entire act. *Todd v. Kelly*, 251 Kan. 512, 516, 837 P.2d 381 (1992). In addition, this court

¹⁰ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

must presume the legislature intends for the courts to give an act a reasonable interpretation to avoid unreasonable or absurd results. 251 Kan. at 520.¹¹

A date of accident nearly 5 months after claimant was last employed by respondent is an absurd result. This Board Member would find that the date of accident in this matter is the last day claimant worked for respondent. Thus, the notice provided on December 15, 2005, would be untimely pursuant to K.S.A. 44-520.

This Board Member would find that the Order of Administrative Law Judge John D. Clark dated July 18, 2006, should be affirmed.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

¹¹ *Id.* at 284.